

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SHANE ANDREW RICHARDS**  
Claimant

VS.

**CONSUMER WINDOW FACTORY  
OUTLET & A1 ROOF SUPPLY, LLC.**  
Respondent

AND

**TRAVELERS INDEMNITY CO.**  
Insurance Carrier

Docket No. **1,043,220**

**ORDER**

Respondent and its insurance carrier request review of the February 27, 2009 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant was respondent's employee and that he suffered accidental injury arising out of and in the course of employment. The ALJ ordered respondent to provide medical treatment as well as temporary total disability benefits beginning November 18, 2008.

Respondent requests review and argues claimant was an independent contractor and not an employee at the time of the accident on November 17, 2008. Consequently, respondent further argues that claimant is not entitled to workers compensation benefits.

Claimant argues that he was hired as an employee for respondent and the ALJ's Order should be affirmed.

The sole issue for Board determination is whether claimant was respondent's employee or an independent contractor.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Respondent is a home remodeling business. Claimant responded to a help wanted advertisement in the Wichita Eagle newspaper for a laborer. He contacted Greg Sikat, respondent's owner, regarding the employment opening. Claimant testified he was hired in July 2008 as a full-time employee earning \$13 an hour. His job consisted of setting up displays, vacuuming the floor, picking up and delivering materials to jobs. Claimant worked in the office with Mr. Sikat and completed job assignments that he was directed to perform.

Claimant testified:

Q. And would he control your activity as far as how you were doing the various assignments he would give you?

A. Yes, he would give me the details and specifications on the job. If it was building a display in the showroom or setting up at a customer's home, all the materials and the tools were provided by Greg; I worked with his equipment.<sup>1</sup>

On November 17, 2008, claimant was transported to a job site by Mr. Tyree Brown as claimant did not have a driver's license at that time. Claimant's job was to tear off the existing roof and then re-roof a detached garage at a private residence. Claimant noted that he had never been out on a job by himself until this occasion. And that Mr. Sikat had taught him how to do residential shingle roofing when they made displays for the showroom. Supplies and materials had already been furnished by Mr. Sikat as well as an air compressor, two nail guns and a ladder. A trailer was also provided for the debris that was being torn off the roof. Claimant testified he brought only his hammer and a tool belt to the job site.

After working about 3-4 hours, claimant was nailing shingles when he fell off the roof approximately 12 feet to the ground. He tried to catch himself and landed on his feet injuring his left ankle and foot. Claimant called Mr. Sikat and was told that he wasn't covered for medical treatment. Claimant then had Mr. Brown transport him to Wesley's emergency room. X-rays were taken of claimant's ankle and foot. Claimant was referred to New Medical Health facility for follow-up since the ER needed approval from Mr. Sikat due to a work-related injury. Claimant contacted New Medical Health facility and was refused so he returned back to Wesley the following day due to increased pain. The doctor took him off work.

Claimant testified he received \$520 per week plus cash bonuses for roof measurements. Respondent did not withhold any taxes but it did deduct 16 percent for workers compensation insurance.

Q. And Mr. Sikat told you they were withholding money from each paycheck for insurance?

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<sup>1</sup> P.H. Trans. at 11-12.

A. Yes.

Q. What kind of insurance?

A. For -- for the workers insurance, for the insurance on the job. 16 percent was deducted off the top for coverage for the employees. And when you walk into the showroom, there's a sign that says, you know, if you don't bring your own insurance or if you're not covered under something for yourself, 16 percent will be deducted from every paycheck. And so I mean I wasn't an independent contractor, I worked for Greg, so therefore I can't carry my own insurance. So when he took 16 percent off the top every week, I just assumed that I was okay when I fell off the roof.<sup>2</sup>

Even though claimant signed a document stating that he was an independent contractor, he testified that Mr. Sikat still controlled his work assignments. Claimant's impression was that Mr. Sikat could fire him at any time.

Q. And you would agree with me that this document states: "I, Shane Richards, acknowledge that I am a self-employed independent contractor"?

A. That's what it says, yes.

Q. And again, you read this before signing it?

A. Yeah, but it's not what was explained to me by my boss as to why I was signing it, so ---

Q. But you understood what it meant to be an independent contractor, right?

A. Not fully, no.

Q. And you understood that taxes would not be taken out?

A. Yeah, I knew that. I knew that taxes weren't being taken out. But I know that as an independent contractor you have to carry a license and insurance also, and I don't have any of those, so therefore, I never thought ever that I would be considered an independent contractor.

Q. But you did sign the form after reading it?

A. Yes.<sup>3</sup>

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<sup>2</sup> P.H. Trans. at 20-21.

<sup>3</sup> P.H. Trans. at 54-55.

Gregory Sikat, owner of Consumer Window Factory Outlet and A-1 Roof Supply, LLC., testified he hired claimant as an independent contractor. Claimant would receive \$20 per measure. If the job was sold, claimant would receive a bonus. Mr. Sikat agreed that claimant would do measures and bid on roofing and if there was a sale made for respondent to do the work then claimant received a bonus. And that claimant would do marketing for respondent and manned a booth at a convention to try to obtain business for respondent. Mr. Sikat testified:

Q. What kind of work did Shane do for you?

A. He did measures, may have done like a roof repair, and marketing. He would canvass - - he would try to drum up business. In fact, if I could go back, one of the checks here for \$200 is because he put time in at one of the shows to help man the booth and try to drum up business, 'cause he knows there's very good bonuses involved. That's what independent sales and marketing person does in our business.<sup>4</sup>

Mr. Sikat further testified that he doesn't control claimant's work activity and he did not provide tools for claimant. Mr. Sikat denied that he provided tools to claimant or that he controlled the work that claimant performed. Mr. Sikat also testified that there were only four checks made out to claimant over the entire period that claimant alleged to have regularly worked for respondent. Mr. Sikat denied that any deduction was made from the checks for workers compensation insurance. Mr. Sikat denied that he talked to claimant on the day of the accident until late in the day when he called to see how claimant was doing.

Samuel J. Smith testified that he has worked for Consumer Window Factory Outlet and A-1 Roof Supply both as an employee and an independent contractor. He further testified that when he worked as a part-time employee he was paid by the hour and that Mr. Sikat did not withhold taxes from his paycheck. Mr. Smith corroborated claimant's testimony that he understood claimant to be respondent's employee. Mr. Smith further testified that he witnessed Mr. Sikat directing claimant as to work activities.

Mr. Smith testified:

Q. Ever have any discussions between you and Mr. Richards about whether Mr. Richards was an employee versus an independent contractor?

A. Yeah, actually the day that he fell off a roof and, you know, he called me up from the emergency room I guess and was like, hey, you know, Greg's trying to tell me I was never his employee and I went as a subcontractor. And so I told him, I says,

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<sup>4</sup> Sikat Depo at 24-25.

well, okay, you know, but he still has to carry the insurance, you know, to -- for that, you know, just -- just that issue of you getting hurt on one of his jobs.

Q. But your thoughts I assume were that Shane was actually an employee?

A. Oh, yeah.

Q. And why did you think that?

A. A subcontractor without wheels, without his own transportation, let alone a truck, trying to go do subcontracting work, in other words, that he's responsible for once he contracts for it? It's impossible. Or highly improbable.<sup>5</sup>

Andrew J. Olsen, an 18-year-old college student, testified that he considers himself an independent contractor due to the paperwork that he signed when hired by respondent. He further testified that no taxes are withheld, no workers compensation insurance, and that he is paid when the job is completed. Mr. Olsen is doing marketing for respondent and he is his own boss. But he agreed that he was paid by the hour. Interestingly, Mr. Olsen corroborated claimant's testimony that he had called Mr. Sikat after his fall. Mr. Olsen testified that claimant had called Mr. Sikat after the fall and then Mr. Sikat had called him and told him to go to the job site to see what had happened.

It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.<sup>6</sup>

There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>7</sup> The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.<sup>8</sup>

The test primarily used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference

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<sup>5</sup> Smith Depo. at 18-19.

<sup>6</sup> *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

<sup>7</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

<sup>8</sup> *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.<sup>9</sup>

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

- (1) The existence of a contract to perform a piece of work at a fixed price.
- (2) The independent nature of the worker's business or distinct calling.
- (3) The employment of assistants and the right to supervise their activities.
- (4) The worker's obligation to furnish tools, supplies and materials.
- (5) The worker's right to control the progress of the work.
- (6) The length of time the employee is employed.
- (7) Whether the worker is paid by time or by job.
- (8) Whether the work is part of the regular business of the employer.<sup>10</sup>

Depending upon whose testimony is more persuasive the evidence contains elements pertaining to both an employee and independent contractor relationship. However, this Board Member concludes the evidence is more heavily weighted in favor of an employer/employee relationship and that relationship was with respondent. Claimant's testimony, corroborated by Mr. Smith, established that respondent provided all of the tools for the job and through Mr. Sikat had the right of control over the work claimant would perform. Claimant was paid by the hour as indicated by at least one of the checks offered into evidence. Most compelling, the work claimant was performing was an integral part of the regular business of the respondent. And the marketing that it was agreed claimant performed, especially at a booth at a convention, is simply not the type of work typically assigned to an independent contractor as evidenced by the fact claimant was paid by the hour for that work.

Claimant did not operate an independent business but only worked for respondent. Claimant maintained an ongoing working relationship with respondent and Mr. Sikat directed and controlled the work that claimant performed. The work that claimant performed was an integral part of respondent's business and Mr. Sikat provided the power tools, materials, and larger equipment items that were needed to perform the tasks that he

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<sup>9</sup> *Wallis* at 102-103.

<sup>10</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

assigned to claimant. Mr. Sikat, instead of claimant, scheduled and controlled the progress of the work; and, Mr. Sikat paid claimant for the number of hours he worked each week rather than on a project basis. Finally, it could easily be concluded that the document claimant was directed to sign that identified him as a subcontractor was entered into in an attempt to avoid payment of unemployment and social security taxes and benefits as well as workers compensation benefits. This Board Member finds, based upon the evidence compiled to date, that claimant was an employee of respondent and affirms the ALJ's Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>11</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>12</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 27, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this 29th day of May 2009.

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DAVID A. SHUFELT  
BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant  
Sylvia B. Penner, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge

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<sup>11</sup> K.S.A. 44-534a.

<sup>12</sup> K.S.A. 2008 Supp. 44-555c(k).